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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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GRAY PANTHERS PROJECT FUND, : Docket No. CA 01-1374
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Plaintiff, : Washington, D.C.
: August 9, 2001
V. : 11:00 a.m.
TOMMY G. THOMPSON, :
Defendant.

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TRANSCRIPT OF PRELIMINARY INJUNCTION DECISION
BEFORE THE HONORABLE HENRY H. KENNEDY, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: VICKI GOTTLICH, ESQ.
ALFRED J. CHIPLIN, JR., ESQ.
Center for Medicare Advocacy, Inc.
Health Care Rights Project
1101 Vermont Avenue, Northwest
Suite 1001
Washington, D.C. 20005

For the Defendant: SCOTT HARRIS, ESQ.
United States Attorney's Office
555 Fourth Street, Northwest
Washington, D.C. 20001

KAREN KAGAN, ESQ.
Department of Health and Human Services

Court Reporter: DOLORES A. BYERS, CSR, RPR
Official Court Reporter

P R O C E E D I N G S

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2 THE CLERK: Gray Panthers Project Fund versus
3 Tommy G. Thompson. Civil Action 01-1374. Vicki Gottlich
4 and Alfred Chiplin for the plaintiff. Scott Harris and
5 Carol Kagan for the defendant.

6 THE COURT: Good morning to everybody.

7 This matter is before the Court for a ruling on
8 plaintiffs' motion for a preliminary injunction. In a
9 nutshell this case concerns the Secretary's decision to
10 disregard two statutory requirements which govern the
11 Medicare Plus Choice program.

12 The first extended a statutorily mandated deadline
13 from July 1st to September 17th for certain managed care
14 organizations to submit information pursuant to 42 USC
15 Section 1395w-24(a). The second issue involves a concurrent
16 decision by the Secretary to disregard the requirement in 42
17 USC Section 1395w-21 that comparative information concerning
18 Medicare Choice Programs be mailed to each Medicare Plus
19 Choice eligible person 15 days before the election period.

20 Plaintiffs seek to force compliance with these
21 obligations. In opposing plaintiffs' motion defendant
22 acknowledges the statutory requirements but insists the
23 Secretary's noncompliance was a proper response to
24 logistical, budgetary and practical considerations, that is,
25 his response was administratively necessary.

1 The Court agrees with plaintiffs' view that this
2 is an easy case though the Court does not blink at the
3 reality that the Secretary has a hard job in administering
4 the complex and multifaceted Medicare program.

5 When ruling on a request for a preliminary
6 injunction a court must consider whether (1) plaintiff has a
7 likelihood of success on the merits of its case, (2) whether
8 irreparable harm will occur if the injunction is not
9 granted, (3) whether injunctive relief would impair the
10 rights of other parties and (4) whether injunctive relief
11 would be in the public interest.

12 These factors interrelate on a sliding scale and
13 must be balanced against each other. Nonetheless, because
14 in the federal system the basis of injunctive relief has
15 always been irreparable harm, some showing of irreparable
16 injury is always required.

17 Turning to these factors, the Court first
18 addresses the plaintiffs' likelihood of success on the
19 merits. As plaintiffs interpret the statute, the
20 requirements couldn't be clearer. Indeed, the Secretary
21 doesn't dispute the plain language of the statute.

22 Defendant, however, maintains that because of
23 administrative necessity the Secretary properly invoked his
24 discretion and determined that the statutory requirements
25 could not be met. The Court agrees with the parties that

1 the congressionally mandated requirements of 42 USC Section
2 1395w-21(a)1 and Section 1395w-21(d) could hardly be
3 clearer.

4 Rather the question presently posed at this stage
5 of the litigation is whether the Secretary's noncompliance
6 with the statutory requirements should be excused. The
7 Court finds that it should not.

8 The Secretary relies on a line of cases beginning
9 with Alabama Power versus Costle to support its argument
10 that he has a certain degree of discretion to implement
11 exceptions to statutory requirements when borne of
12 administrative necessity.

13 While the cases relied upon by defendant do appear
14 to support the proposition that agencies can possess certain
15 residual authority to create statutory exceptions based upon
16 administrative feasible, this discretion is extremely
17 limited. The cases relied upon by the Secretary acknowledge
18 several important limitations. First, as noted by the D.C.
19 Circuit in Alabama Power, these limited exceptions do not
20 apply where there exists an, and I quote here, an
21 unambiguous demonstration of congressional intent to
22 foreclose them, end quote.

23 In Alabama Power the Court also noted that, quote,
24 there exists no general administrative power to create
25 exemptions to statutory requirements based upon the agency's

1 perceptions of costs and benefits, end quote.

2 Furthermore, an agency seeking relief from a
3 statutory obligation on the grounds of administrative
4 necessity bears a heavy burden of establishing the
5 impossibility of compliance. At this juncture, however, the
6 Court need not decide if under these circumstances, where
7 the statute is crystal clear, an exception based on
8 administrative necessity is available.

9 Assuming arguendo that such an exception might
10 exist, the Court finds that the Secretary has not met his
11 especially heavy burden of establishing that compliance with
12 the statute is not feasible. The Secretary has emphasized
13 the problems the statutory deadlines pose for MCO's and CMS
14 in addition to the high cost of compliance.

15 While the Court recognizes the Secretary's
16 concerns, it does not find them sufficient to find
17 noncompliance. Indeed, these identical considerations have
18 been presented to Congress on several occasions. In 1999
19 Congress partially responded to these concerns by extending
20 the deadline for MCO's to submit ACR information from
21 May 1st to July 1st. Congress also considered amending
22 Section 1395w-21 to alleviate some of the problems
23 associated with mailing comparative information to all
24 beneficiaries. The Court would refer or cite House Report
25 106-436, Part One at 38 dated November 2nd, 1999.

1 This amendment, however, was not enacted into law.
2 Lastly, just this May, a bill was again introduced to extend
3 the deadline for ACR submissions. Mirroring the Secretary's
4 unilateral action HR-1993 proposes to extend from July 1st
5 to September 17th the time for MCO's to submit ACR
6 information.

7 However, neither the existence of pending
8 legislation nor support from its sponsors gives the
9 Secretary authority to ignore the current congressionally
10 mandated requirements. Both Congress and the Secretary know
11 how to change these deadlines legislatively and have done so
12 in the past.

13 The Court also notes that the Secretary's argument
14 regarding infeasible is further undermined by the fact that
15 for the past several years CMS has complied with the statute
16 to at least some extent and certainly more so than it
17 intends to do this year. Nor is the Court persuaded that
18 the availability of comparative information over the phone
19 and the Internet substitutes for the mailing required by
20 statute. Although the Court recognizes the possible merit
21 in these alternative methods, the statute clearly speaks for
22 itself.

23 Congress has required that the comparative
24 information be mailed. Although elsewhere the statute also
25 mandates the creation of a phone line and a website, there

1 is no similar requirement that the comparative information
2 be available through these medias. The fact that CMS has
3 voluntarily elected to make detailed information available
4 in these forms is commendable. But it does not excuse its
5 obligation to mail comparative information to eligible
6 beneficiaries.

7 For these reasons the Court finds that plaintiffs
8 have demonstrated a substantial likelihood of success on the
9 merits.

10 Next, addressing the issue of irreparable harm,
11 the Court agrees with plaintiffs that they have made a
12 sufficient showing. Plaintiffs maintain that by not mailing
13 comparative information regarding M+C plans in a timely
14 fashion beneficiaries will thus lack the most basic
15 information to decide whether to remain in their M+C plan,
16 to move to another M+C plan or to return to traditional
17 Medicare.

18 Defendant has failed to rebut plaintiffs' showing
19 of irreparable harm. Defendant does argue, however, that
20 the harm alleged by plaintiffs will be mitigated by the
21 availability of information via the phone and Internet.

22 The Court disagrees with defendant and finds that
23 these sources of information, although useful, will not
24 alleviate the harm alleged by plaintiffs. For instance, as
25 the CMS administrator recently stated in testimony before

1 Congress, a CMS sponsored survey revealed that in 1999 only
2 21.3 percent of Medicare beneficiaries reported having
3 access to the Internet.

4 The Secretary responds to this figure by
5 indicating that CMS plans to spend \$35 million on an
6 advertising campaign to inform beneficiary about where to
7 obtain Medicare information. This campaign, however, fails
8 to remedy the harm plaintiffs allege.

9 Additionally, the Court is astounded that the
10 Secretary has the audacity to argue that compliance with the
11 statutory mailing requirement is too expensive while
12 simultaneously electing to spend \$35 million on
13 advertisements. In short, the Court is satisfied the
14 plaintiffs face irreparable harm that cannot be remedied at
15 a later date by money damages.

16 The remaining factors, defendant's rights and the
17 public interest, also favor issuance of the injunction.
18 First, the public interest almost always favors agency
19 compliance with the law. Such compliance is especially
20 important when, as here, the statute being violated by the
21 agency concerns the provision of health care to millions of
22 Americans.

23 Next, the Court finds that defendant will not be
24 harmed by the issuance of this injunction. The Secretary
25 argues that an injunction will significantly burden MCO's

1 and may ultimately result in fewer choices for
2 beneficiaries. While the Court does not minimize these
3 realities, they do not militate against the issuance of an
4 injunction. These policy considerations are within
5 Congress' domain not that of the Secretary.

6 Congress has carefully weighed these issues and
7 nonetheless enacted the existing statutes. The fact that
8 the Secretary would have preferred a different outcome is of
9 no relevance here.

10 For the reasons just stated and for the reasons
11 stated by plaintiffs in their arguments and papers, the
12 Court concludes that all four factors of the preliminary
13 injunction standard favor the issuance of an injunction.
14 Consequently an injunction shall issue.

15 When fashioning appropriate injunctive relief,
16 however, the Court is mindful that its equity jurisdiction
17 is unique in its flexibility. In weighing the competing
18 interests of plaintiffs, the defendant and the public the
19 Court should reach a nice adjustment and reconciliation
20 between the competing claims by balancing the conveniences
21 of the parties and possible injuries to them as they may be
22 affected by the granting or withholding of the injunction.

23 The last words spoken are a citation from a
24 Supreme Court case Weinberger versus Romero-Barcelo, cited
25 at 456 US 305, jump cite 312, 1982.

1 Plaintiffs' proposed order would have the Court,
2 first, require MCO's to submit ACR information to the
3 Secretary by the end of August, that is, within the next
4 three weeks and, second, require the Secretary to comply
5 with the statute by mailing comparative information to
6 beneficiaries.

7 First, with respect to this July 1st, 2001,
8 deadline, this date has already passed. The parties
9 recognize that the Court, therefore, cannot order compliance
10 with this deadline.

11 However, although the Court could require MCO's to
12 submit their ACR data immediately or sometime before
13 September 17th, it will not do so. Despite the Secretary's
14 blatant violation of Section 1395 of the governing statute,
15 that is, 1395w-24(a) it may very well be overly disruptive
16 for the Court to order the Secretary to now require MCO's to
17 submit ACR information on such short notice.

18 With respect to the mid-October mailing to
19 beneficiaries, however, this deadline has not yet passed.
20 Indeed, this is, by all accounts, the more important issue.
21 The timing for the submission of ACR information is relevant
22 primarily to the extent that it allows CMS to prepare and
23 review comparative information for beneficiaries in advance
24 of the October mailing.

25 For the reasons just stated the Court will order

1 the Secretary to comply with the requirements of Section
2 1395w-21(d).

3 The Court finds the Secretary's protestations that
4 a compliance is not possible at this late stage
5 unconvincing. The Secretary's logic is similar to that of a
6 child who kills his parents and then seeks pity as an
7 orphan. The Court looks dimly upon such excuses. Any
8 timing or budgetary problems the Secretary now faces in
9 complying with the statute are problems of his own making.
10 In complying with the Court's order the Secretary may find
11 it necessary to obtain information from MCO's prior to
12 September 17th. That is a matter that he will have to
13 address.

14 In fact, should this be the case, the Secretary
15 would be well advised to rescind the deadline that he set
16 and direct MCO's to submit ACR information by an earlier
17 date. The Court fully expects the Secretary to comply with
18 both this order and the relevant statutory provisions.

19 To this end, the Court will set a further hearing
20 in this case for September 17th at ten o'clock a.m. At that
21 time the Secretary shall inform the Court and plaintiffs of
22 all efforts being taken to comply with the Court's order and
23 the requirements of Section 1395w-21(d).

24 Prior to the hearing and by no later than
25 4:30 p.m. on Friday, September 14th, the Secretary shall

1 file with the Court and shall serve upon the plaintiffs a
2 report detailing all efforts being made toward compliance.
3 An appropriate order shall accompany, well, an appropriate
4 order will issue this date and I will read it now. Of
5 course, it will be filed.

6 For the reasons stated by the Court in its oral
7 ruling, it is this 9th day of August 2001 hereby ordered
8 that plaintiffs' motion for a preliminary injunction is
9 granted.

10 And it's further ordered that defendant, his
11 successors in office, his agents, employees and all persons
12 acting in concert with him are enjoined from declining to
13 comply with the requirements of 42 USC Section 1395w-21(d)
14 and are accordingly directed to, at least 15 days before the
15 beginning of the contract year 2002 coordinated election
16 period, mail to each Medicare Plus Choice eligible
17 individual residing in an area the information specified in
18 42 USC Section 1395w-21(d) including, among other
19 information, the information required under 42 USC Section
20 1395w-21(d) (2) (A) (ii) to be presented in a comparative form.

21 And it is further ordered that the parties shall
22 be present for a hearing in this case on Monday,
23 September 17th, 2001, at ten o'clock a.m. at which time the
24 Secretary shall inform the Court of all efforts being taken
25 to comply with this order and the requirements of Section

1 1395w-21(d).

2 And it is further ordered that by no later than
3 4:30 p.m. on Friday, September 14th, 2001, the Secretary
4 shall file with the Court and deliver to chambers a report
5 detailing all efforts being made to comply with this order
6 and the requirements of Section 1395w-21(d). This report
7 shall also be served on counsel for plaintiffs.

8 And the Court is affixing its signature to this
9 order presently. And the order shall be filed.

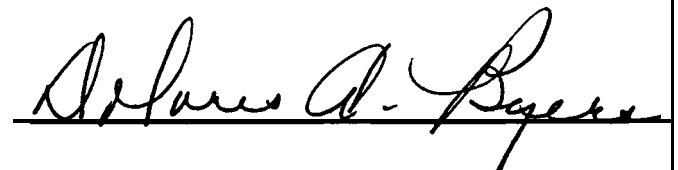
10 Good day.

11 (Whereupon, at 11:22 a.m., the motions hearing in
12 the above-entitled matter concluded.)

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14 CERTIFICATE OF COURT REPORTER

15 I hereby certify that the foregoing is a correct
16 transcript in the proceedings in the above-entitled matter.

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18 DOLORES A. BYERS, CSR, RPR

19 OFFICIAL COURT REPORTER
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UNITED STATES DISTRICT COURT
FOR ~~THE~~ DISTRICT OF COLUMBIA

TEE GRAY PANTHERS
PROJECT FUND, et al.,

Plaintiffs,

v.

TOMMY G. THOMPSON, Secretary of
Health and Human Services,

Defendant.

Civil Action No. 01-1374 (HHK)

FILED

AUG 09 2001

NANCY MAYER WHITTINGTON, CLERK
US. DISTRICT COURT

ORDER

For the reasons stated by the court in its oral ruling, it is this 9th day of August., 2001,
hereby

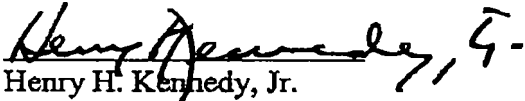
ORDERED that plaintiffs' motion for a preliminary injunction is **GRANTED**; and it is
further

ORDERED ~~that~~ defendant, his successors in **office**, his agents, employees, and all
persons acting in concert **with** him, are enjoined from declining to comply with the requirements
of 42 U.S.C. § 1395w-21(d) and are accordingly directed to, at least 15 days before the beginning
of the contract year 2002 coordinated election period, mail to each **Medicare+Choice** eligible
individual residing in an area the information specified in 42 U.S.C. § 1395w-21(d), including,
inter alia, ~~the information required~~ under 42 U.S.C. § 1395w-21(d)(2)(A)(ii) to be presented in a
comparative form; and it is further

ORDERED that the parties shall **be present** for a hearing in this case on Monday,
September 17, 2001, at 10 am., at which time the Secretary shall **inform** the court of all efforts

being taken to comply with this order and the requirements of § 1395w-21 (d); and it is further

ORDERED that by no later than 4:30 p.m. on Friday, September 14, 2001, the Secretary shall file with the court, and deliver to chambers, a report detailing all efforts being made to comply with this order and the requirements of § 1395w-21(d). This report also shall be served on counsel for plaintiffs.


Henry H. Kennedy, Jr.
United States District Judge